

No contraceptive sterilization of the mentally retarded: The dawn of "Eve"

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Like many medicolegal judgements, the Supreme Court of Canada's strong and unanimous decision in the *Eve* case,¹ barring the contraceptive sterilization of a mentally retarded person, has been more widely commented on than read. Poorly considered emotional denunciations, sometimes followed by misconceived self-vindication, (*The Globe and Mail* Feb. 8, 1987: p. 2) have so inadequately addressed the legal principles and medical evidence in the decision that a serious disservice may have been done. The sooner the significance of the case dawns, the better served the legal interests of both mentally handicapped patients and the medical profession will be.

An optimistic view of the judgement is that its effect is more limited than at first appears.² The language and reasoning of the case indicate, however, that its practical consequences are restrictive, incisive and basic.

Health is one of a number of interests of retarded persons that the law protects. The well-meaning intentions of parents, other guardians and physicians to help retarded persons by medical means are subject to judicial supervision. Proposed incursions on the physical and/or mental integrity of vulnerable persons

invoke the courts' special protective role under its parental (*parents patriae*) jurisdiction.

The person described as "Eve" is a mild to moderately retarded Prince Edward Island woman, aged 24 in 1979 when the case first arose. Her mother sought her sterilization for reasons of contraceptive protection,

sought to treat any medical condition. Its purposes are admittedly nontherapeutic. One such purpose is to deprive Eve of the capacity to become pregnant so as to save her from the possible trauma of giving birth. ... As to this, it should be noted that there is no evidence that giving birth would be more difficult for Eve than for any other woman. A second purpose of the sterilization is

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to guard both Eve against pregnancy and childbirth and the mother against becoming responsible for rearing Eve's child. When a majority of the PEI Appeal Court approved the procedure, Eve's mother proposed with medical agreement that Eve would be subjected to a hysterectomy.

The Supreme Court of Canada found that such major surgery was excessive for the purpose explained, and took the proposal to demonstrate the potential for violation of Eve's physical and mental integrity. The court noted that:

"Eve's sterilization is not being

to relieve Mrs. E. of anxiety about the possibility of Eve's becoming pregnant and of having to care for any child Eve might bear."³

A distinction exists between undertaking therapy and pursuing health. Therapy is designed to reverse illness or perhaps to prevent illness, but health is a wider concept. The Constitution of the World Health Organization declares that:

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

In *Eve*, the court recognized

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the legality of therapeutic sterilization for "mental as well as physical health",⁴ but considered that irreversible surgery is not permissible for social benefits such as being allowed private time with a member of the opposite sex. They must be sought by less invasive and final means.

The CMA Committee on Ethics regrets that the court found that nontherapeutic sterilization could not be beneficial to a person unable to consent,⁵ but the court found evidence that the procedure could harm legal interests in physical and mental integrity.

Noting a social history that still "encourages many to perceive the mentally handicapped as somewhat less than human",⁴ the court reflected on the "... considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped",⁶ not least in signifying to them their reduced or degraded

status. Courts cannot expose the disadvantaged to the risk of such damage by approving nontherapeutic irreversible procedures in the hope for instance that their guardians will permit enrichment of retarded persons' social lives.

While there was evidence of the risk to physical and mental integrity caused by nonconsensual surgical sterilization, the alleged benefit claimed to justify such a procedure was unestablished by medical evidence. Pregnancy and birth were not shown to be specially traumatic to Eve, and relief from childrearing appeared to benefit Eve's mother rather than Eve herself, whose own incapability of rearing a child was accepted. Benefit to others or to society is not a ground for exercising a protective power in favour of nontherapeutic surgery.

Courts cannot risk intrusive, irreversible procedures being conducted on nonconsenting

handicapped persons for alleged benefits to them that are, as the Supreme Court found in *Eve*, "highly questionable".⁷ The court was made additionally cautious by such medical uncertainties as Eve's future means to be relieved at least in part from intellectual incapacity, development of less intrusive, reliable, contraceptive alternatives, and the degree of distress she might suffer on learning of her sterilization.

The 1979 US Supreme Court case of *Stump v. Sparkman*⁸ was discussed in *Eve*. This case concerned a married woman who went to an infertility clinic because she had failed to conceive the child she and her husband wanted. She then learned that a judge had ordered her sterilized when she was a "somewhat" retarded child, on her mother's medically supported petition. At the time she was told she was undergoing an appendectomy. The case reinforced the court's fear arising from the facts of *Eve*

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that abuse of retarded persons' rights and bodies is liable to occur when the protective zeal of parents and physicians is unchecked.

The court did not define procedures that are permissible, perhaps without prior judicial approval, because they are clearly therapeutic. Procedures directed to bona fide ends other than sterilization are legitimate even if sterility is a secondary effect. Treatment, for instance, of testicular cancer by removal of both testicles is lawful when medically indicated and appropriately approved extrajudicially, although sterility will result. The court unanimously approved the observation of Mr. Justice Gérard La Forest that:

"... sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem."⁹

Accordingly, health care professionals cannot hope to evade or limit the effect of the decision by using imaginative or contrived descriptions of contraceptive sterilization as "therapeutic". The perception that "therapeutic" abortion may be given an extended meaning is not relevant. Under Section 251 of the Criminal Code a woman's abortion is lawful only when continuation of pregnancy "would or would be likely to endanger her life or health", and any uncertainty may properly be resolved in favour of her protection by performance of the procedure. Contraceptive sterilization of nonconsenting handicapped persons is seen as being of "highly questionable"¹⁰ benefit to them, and any uncertainty must be resolved against performance of the procedure.

The outer limit of therapy was shown in the 1985 case *Re K and Public Trustee*,¹¹ where the British Columbia Court of Appeal approved a hysterectomy for a seriously retarded girl below the age of menarche who was found to have a phobic aversion to

blood and to become gravely disturbed at its sight. The trial court had dismissed the application for hysterectomy as premature. In allowing the procedure on the ground that menstruation would be so traumatic as to jeopardize the girl's physical and/or mental health, the Court of Appeal stressed that:

"... this case cannot and must not be regarded as a precedent to be followed in cases involving sterilization of mentally disabled persons for contraceptive purposes."¹²

Reviewing the therapeutic finding, however, the Supreme Court said that:

"The recent British Columbia case of *Re K*, supra, is at best dangerously close to the limits of the permissible."⁹

The *Eve* case was decided not under principles of the Canadian Charter of Rights and Freedoms, but according to the courts' ancient powers to protect those unable to protect themselves. In denying existence of inherent authority to approve nonconsensual, nontherapeutic sterilization, the court recognized that provincial legislation might be enacted to allow courts or other bodies to give approval. It was noted that Alberta in 1972 and British Columbia in 1973 had repealed statutes providing for the sterilization of mentally defective persons. The court observed that were such a statute to be enacted now:

"The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the Canadian Charter of Rights and Freedoms and otherwise."¹³

From the tenor of *Eve*, such scrutiny is likely to be rigorous, since nonconsensual, contraceptive sterilization was found to risk psychological harm and to lack any medically proven compensating justification.

Inescapable and demanding though judicial scrutiny has now become of proposals for contra-

ceptive sterilization of mentally incompetent persons and those of borderline or questionable competence, there is room for the position to evolve. (Both law and professional ethics apply to a deceptive or negligent finding of competence by which a mentally retarded person "consents" to his or her own contraceptive sterilization.) The Supreme Court placed much reliance on the 1976 English case *Re D (a minor)*.¹⁴ Taking due account of this decision in May of this year, the English House of Lords approved tubal occlusion of the fallopian tubes of a moderately mentally handicapped girl aged 17. She was becoming at risk of pregnancy and, due to medications she took and behavioural disorders, alternative contraceptive means were inappropriate. (*Re B (a minor) (Sterilization)*, London *The Times* May 1, 1987)

The Supreme Court of Canada can change its own decisions. Accordingly, a medically advised guardian of a person such as *Eve* may go to court to seek approval of what was denied in the *Eve* case, on the ground that contraceptive sterilization is therapeutically indicated. It is unlikely that approval will be given, however, at a level below that of the Supreme Court of Canada.

References

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3. *Eve v. Mrs. E.*, 2, SCR 400 (1986)
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5. Statement on contraceptive sterilization of the mentally retarded. CMA Committee on Ethics. *Can Med Assoc J* 1987; 136: 650-651
6. *Eve v. Mrs. E.*, 2, SCR 429 (1986)
7. *Ibid*: 431
8. *Stump v. Sparkman*, 435, USR 349 (1979)
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10. *Ibid*: 431
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12. *Ibid*: 275
13. *Eve v. Mrs. E.*, 2, SCR 432 (1986)
14. *Re D (a minor)*, All ER (Family Division) 326 (1976)